

**IN THE FAIR COMPETITION TRIBUNAL OF TANZANIA
AT DAR ES SALAAM**



TRIBUNAL APPEAL NO. 2 OF 2015

EMIRATES AIRLINESAPPELLANT

VERSUS

IRFAN M. DINANI1ST RESPONDENT

**TANZANIA CIVIL AVIATION AUTHORITY
(TCAA).....2ND RESPONDENT**

RULING

When this appeal came up for hearing, 1st respondent took objection to the appeal on the following grounds:

- (1) The Notice of Appeal filed by the Appellant on 6th May, 2015 is incurably defective because the appellant in moving the Tribunal erroneously referred to the Tribunal's Order dated 17th April 2014, issued in application No. 5 of 2012 and not the Tribunal's Order

dated 29th April, 2015 issued in Application No. 13 of 2014.

- (2) The statutory notice published pursuant to Rule 16 of the Fair Competition Rules 2012 in the Guardian news paper of 18th May is incurably defective for:
- (a) Incorrectly referring to the 2nd respondent as the TCRA, and
 - (b) Incorrectly summarizing the principal grounds relied on, as required by Rule 16(e) by starting that, the investigation unit lacked jurisdiction. Whereas in para 8 of its Memorandum of Appeal the appellant alleges that "the investigation unit had been seized with jurisdiction".

Tribunal having gone through the preliminary objection raised, requested parties to address preliminary objection number one on legality of the Notice of Appeal.

Submitting in support of the 1st preliminary objection, 1st respondent who was in person requested Tribunal to struck out Notice of Appeal for having referred different date of decision. Mr. Dinani submitted that, filing of documents in this Tribunal, one has to refer rules or Ruling of Orders in case of filing of appeal out of time. Notice of Appeal filed refers order dated 17th April,

2014 issued in application No. 5 of 2012, which said Notice of Appeal should be filed within 14 days from the date of ruling.

1st respondent was of the firm view that, the appeal is out of time because 14 days from 17th April, 2014, appeal should have been filed by 1st May, 2014. Mr. Dinani further submitted that, it is true that there was an order issued by Tribunal on 29th April, 2015 in application No. 13 of 2014. It is this order that should have been referred. To Mr. Dinani, there is no notice of appeal legally filed, therefore there is nothing to move Tribunal to determine the appeal. To support his argument, the 1st respondent cited the case of **China Henan International Cooperation Group vs. Salvand K.A. Rwegasira Civil Reference No. 22/2005, Court of Appeal decision (unreported)** in which it was held that:

“Once an application is based on wrong legal foundation it is bound to collapse.”

Mr. Dinani further insisted that, on the same case of China Henan (supra) rejecting reliance of Article 107 of the Constitution, to dispense justice, Court of Appeal held that:

“Error by the appellant referring to the wrong provision is not technical, but goes to the fundamental procedures”.

In response, Mr. Nangi, for the appellant while admitting that Notice of Appeal referred to the wrong date of decision, he was quick to point out that, circumstances are different from what Mr. Dinani is saying. Appellant's counsel submitted that situation at hand is on filing of notice of appeal as provided under rule 9 of the FCT Rules 2012. In the above rule, there is nowhere it is provided that a party is obliged to attach an order that gives right to appeal, after obtaining leave to appeal out of time. The proper order to be referred is one dated 29th April, 2015 which did not specify time, but, the law provided for 21 days. It was error on the part of the appellant referring to order dated 17th April, 2014 which granted appellant to file notice within 14 days.

Mr. Nangi was of the firm view that, the circumstances at hand requires Tribunal to invoke rule 33 of the FCT Rules and allow appeal to proceed on merits because the objections raised are not purely point of law. Appellant's counsel invited Tribunal to be guided by article 107 of the Constitution that requires Courts to do away with procedural rules for substantive justice.

Mr. Nangi further submitted that case of China Henan cited by 1st respondent is distinguishable in the circumstances of this case. He said, in the China Henan case, there was citation of wrong provision of the law, while in the present case it is not. Mr. Nangi

finally prayed for dismissal of the 1st preliminary objection, for appeal to proceed on merits.

By way of rejoinder, Mr. Dinani submitted vigorously that, appellants are negligent by citing wrong date of this Tribunal order. It is not slip of the pen. It is obvious that appellants have not directed the Tribunal properly and the party against which decision is complained of.

Mr. Dinani insisted that, following number of applications filed in relation to this matter, the appellants ought to have cited the proper order and date. It is true that, the law does not necessitate to state date of decision but once cited, it has to be appropriate order and date. The 1st respondent insisted that, Tribunal will not do justice to him by dismissing his preliminary objection while the appellants have been acting negligently since 2009. Mr. Dinani then, requested for striking out of Notice of Appeal with costs because it is not a matter to be dealt with under Article 107 of the Constitution of the United Republic of Tanzania, 1977 as amended from time to time.

Upon careful consideration of the argument presented by the respective parties, we agree entirely with 1st respondent's argument that, appellants have not properly moved Tribunal by referring order dated 17th April, 2014 in application No. 5 of 2012

instead of an order dated 29th April, 2014. By referring to order dated 17th April, appellant was directed to file notice of appeal within 14 days. Therefore not only appellant has cited wrong date of the order but even the order speaks of different step to be taken. And if such step is taken, gives different results. In the case at hand, this Tribunal by an order dated 29th April, 2015 allowed appellant to file his appeal out of time. As correctly submitted by Mr. Nangi, there was no time provided, but normally the law provides for twenty one (21) days. So what was expected is filing of an appeal before expiry of twenty one (21) days. So, appellant by referring in the notice of appeal following words: **Fair Competition Tribunal's order dated 17th April, 2014**), it is totally wrong.

It is true that in terms of Rule 9 of the FCT Rules, there is no requirement of referring or attaching the said order. However, as correctly submitted by 1st respondent once it is stated, it has to be started correctly. Once it is wrong started like in the case at hand, it directs Tribunal and parties to a different issue, so, the notice is defective.

Requirement of a notice is so important because direct Tribunal on the issue to be challenged. Defective notice renders the appeal to be incompetent. Mr. Nangi has requested this Tribunal to invoke application of Article 107 of the Constitution to do away

with technicalities for substantive justice. With due respect, this is not the matter of technicality, rather, it is fundamental issue. An appeal is creature of statutes. Time, form and the manner appeal to be filed is provided by statutes. These are rules of procedure that need to be applied stringently, because they go to the root of the appeal. Non compliance of the same is fatal. It cannot be cured by invocation of Article 107 of the Constitution.

In the circumstances of this matter, justice demand striking of notice of appeal for being defective with costs. According Notice of Appeal dated 6th May, 2015 is struck out with costs.

It is so ordered.



Judge Z.G. Muruke – Chairman

Mr. Gregory L. Ndanu – Member



Mr. Onesmo M. Kyauke – Member

27/10/2015

Ruling delivered today 29th day of October, 2015 in the presence of Mr. Stenslau Ishengoma, for the appellant, 1st respondent in person and Ms Kitakwa for the 2nd respondent.



Judge Z.G. Muruke – Chairman



Mr. Gregory L. Ndanu – Member



Mr. Onesmo M. Kyauke – Member

29/10/2015